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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO FLORES RAMIREZ,

Defendant and Appellant.

G050436

(Super. Ct. No. 12CF1076)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Alberto Flores Ramirez of forcible rape (Pen. Code, § 261, subd. (a)(2) [counts 1 and 4]; all statutory citations are to the Penal Code unless noted otherwise), forcible oral copulation (§ 288a, subd. (c)(2) [counts 2 and 6], sexual penetration by a foreign object (§ 289, subd. (a)(1) [count 3]), and attempted forcible oral copulation (§§ 288a, subd. (c)(2), 664 [count 5]). The jury also found he committed sexual offenses against more than one victim. (§ 667.61, subds. (b), (e)(4) [counts 1, 2, 3, 4, and 6].) Ramirez contends the trial court abused its discretion when it denied his motion to sever charges. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

The prosecution presented evidence Ramirez committed sexual offenses against two women, E.Q. and A.P. Both crimes occurred in 2012 and shared distinct similarities.

E.Q.

E.Q. (age 35 at trial) met Ramirez through a dating Web site, although she was not interested in a romantic relationship with him. She told him her daughters lived with their father in Mexico, who refused E.Q.'s request to send the girls to her in the United States. Ramirez claimed he could convince the father to bring E.Q.'s daughters to her by performing a ritual known as the "Holy Death," or "Santa Muerte." E.Q. had heard of the ritual, believed it might work, and agreed to meet Ramirez.

On the afternoon of April 3, 2012, E.Q. met Ramirez at a store in Santa Ana. He bought various items, including eggs, and she accompanied him to a restaurant, and then to a drug store to print out photographs of her daughters. He took her to the Aloha Motel in Santa Ana.

Entering the motel room, Ramirez put the items he bought earlier on the bedside table. Ramirez told E.Q. to sit on the bed and relax, allow her mind to go blank,

and then to lie down with her eyes closed. He moved an egg over her head, then over her body, and touched her with it as he uttered a prayer. After about ten minutes, he cracked the egg into the glass and explained he was removing bad vibes. He claimed she needed a second cleansing because someone was working evil on her, but for the second cleansing she must remove her clothes. She initially declined, but he asked her to trust him, saying he had done this before, not to worry, and he wanted to help. She stripped down to her underwear, reclined on the bed and closed her eyes while he again moved an egg over her body.

After about 10 minutes, he began touching her vagina over her underwear with the egg in his mouth. He pulled her underwear aside to make direct contact between his mouth and her vagina. She pushed his head away and covered herself with a comforter. He asked her to forgive him, claimed he did not do those things, and he asked to continue his work. When E.Q. refused he climbed on top of her, grabbed her wrists, and told her he only wanted to do it once then would leave her alone. She resisted and began yelling and crying. He held her hands above her head with one hand, lowered his zipper, and put on a condom. When she continued to struggle he threatened something worse would happen if she did not cooperate. Fearing for her life, she stopped struggling, and after he replaced a torn condom, he penetrated her with his penis.

Afterward, E.Q. pleaded with Ramirez to allow her to go home. He told her to shut up and calm down. She tried calling 911 but her phone was not charged. She could not leave because she did not know how to get back to her car. When Ramirez came out of the bathroom, he asked for forgiveness and then drove her back to her car. He drove ahead of her to a gas station and stood with her as she pumped gas. They parted ways at the gas station and another man assisted her in calling 911. E.Q. said she had just been raped and provided Ramirez's license plate number.

An ambulance transported E.Q. to a hospital. A swab of E.Q.'s left breast contained Ramirez's DNA. Redness on E.Q.'s left forearm and wrists, a bruise and

abrasion to her left hand and thumb area, and tenderness on her right arm was consistent with E.Q.'s history. Crime scene evidence, including eggs and used condoms with Ramirez's DNA, also supported E.Q.'s version of events. E.Q. stated her neck, legs and wrists hurt for a week after the assault. E.Q. told a nurse and a police officer that Ramirez also sexually penetrated her with his fingers.

During a covert phone call recorded by investigators, Ramirez asked E.Q. for forgiveness and stated he "should not have done that," but said he liked her "a lot" and her beauty and body "drove [him] crazy," and he lost control. He admitted she told him "No" many times and he abused and raped her.

In a statement to the police, Ramirez corroborated much of E.Q.'s account. He initially denied using condoms, but confronted with the possibility his DNA evidence would be found, he admitted using a condom, but denied penetrating E.Q., explaining he only rubbed his penis on the outside of her vagina until he ejaculated inside the condom. He admitted E.Q. said no several times and she fought him, but he kept going because she was beautiful. He admitted putting his hands on her mouth because she was screaming, telling her to shut up. He asked her for forgiveness because he saw she was scared.

A.P.

Shortly after a press release disclosed the incident with E.Q., A.P. (age 53 at trial), who lived in Las Vegas, contacted Santa Ana police and disclosed a similar incident that occurred in February 2012. She met Ramirez through a social networking Internet site. They communicated through the computer and spoke over the phone. In talking about their lives, A.P. expressed the belief of her family and friends that a bad spell had been placed on her because she had bad luck in romantic relationships.

Ramirez offered to perform a cleansing. A.P. took a bus from Las Vegas to Santa Ana with a female friend, Patricia, who also wanted a cleansing. On February 17, 2012, they met Ramirez and went to the same store to buy eggs, and the same motel

where Ramirez later assaulted E.Q. Ramirez told the women they could only go into the room one at a time, and A.P. went first. After she stripped to her underwear, Ramirez rubbed a liquid over her body, which smelled bad and caused her to become dizzy. Ramirez removed her underwear and made skin to skin contact with his mouth on her vagina. He attempted to touch her mouth with his penis but did not succeed. He penetrated her vagina with his penis. A.P. cried and had an asthma attack, and Ramirez stopped. She got dressed and Ramirez told her to wait by the car. Patricia went into the room with Ramirez. A.P. realized Patricia was at risk. She knocked on the motel room door and when Ramirez opened the door, she saw Patricia sitting naked on the bed. She told Patricia to get dressed and leave the room. Ramirez dropped them off at a restaurant, but left with their luggage in his car, promising to return, however, he never came back.

A.P. saw Ramirez's photo on the news, called a television station to report Ramirez's assault, and submitted to a news show television interview. She told the interviewer she became dizzy after Ramirez applied the liquid and she did not remember what happened. She did not provide details because she was embarrassed. She provided a detailed account of the incident to a police detective, however, who corroborated certain details of her account.

At trial in April 2014, a jury convicted Ramirez as noted above. In July 2014, the trial court imposed a sentence of 45 years to life in state prison.

II

DISCUSSION

The Trial Court Did Not Abuse Its Discretion By Denying Ramirez's Severance Motion

Ramirez contends the trial court erred by denying his pretrial motions to sever the charges involving E.Q. (counts 1-3) from those involving A.P. (counts 4-6). He argues the joint trial interfered with his Fifth Amendment rights because he wanted to testify about A.P.'s allegations, but not those involving E.Q.. Trial counsel asserted

Ramirez would testify he and A.P. had a romantic online relationship, but he lost interest after they exchanged photographs. When he met A.P. at the motel, he rejected her sexual advances. He did not want to testify concerning E.Q. because he already had spoken to the police. He feared a jury in a joint trial would consider his silence about E.Q.'s accusations as an implicit admission.

Section 954 provides: “‘An accusatory pleading may charge two or more different offenses . . . of the same class of crimes or offenses, under separate counts’” Joint trials are preferred by section 954 for reasons of judicial efficiency. (*People v. Soper* (2009) 45 Cal.4th 759, 769 (*Soper*); *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1218-1220.) The burden is on the party seeking severance to clearly establish that a joint trial would create a substantial danger of prejudice unless the court granted separate trials. (*People v. Ruiz* (1988) 44 Cal.3d 589, 605; *Alcala, supra*, 43 Cal.4th at p. 1220 [defendant must make a clear showing of prejudice to establish the trial court abused its discretion in declining to sever properly joined charges].) In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, the appellate court considers the record before the court when it made its ruling. (*Alcala, supra*, 43 Cal.4th at p. 1220.) “Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a ‘weak’ case has been joined with a ‘strong’ case, or with another ‘weak’ case, so that the ‘spillover’ effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns into a capital case.” (*People v. Sandoval* (1992) 4 Cal.4th 155, 172 (*Sandoval*).)

Here, the evidence in the two cases was highly similar. Evidence from the E.Q. case would have been admissible in a separate trial involving A.P. (Evid. Code, §§ 1101, subd. (b) [other crimes evidence admissible when relevant to prove a fact such

as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident], 1108 [evidence of the defendant's commission of other sexual offenses admissible unless it is unduly prejudicial under section 352].) "If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*Soper, supra*, 45 Cal.4th at p. 774-775.)

Although the evidence supporting the charges involving A.P. was arguably weaker than the evidence involving E.Q., the A.P. charges were not unusually likely to inflame the jury against the defendant. (*Sandoval, supra*, 4 Cal.4th at p. 172.) Finally, while the desire to testify in one case may be a factor to consider in assessing prejudice from joined charges, "severance is not required on such grounds unless the defendant makes a showing that ""he has both important testimony to give concerning one count and [a] strong need to refrain from testifying on the other."" (*People v. Thomas* (2012) 53 Cal.4th 771, 800 (*Thomas*); *Sandoval, supra*, 4 Cal.4th at p. 174.) "The showing must be specific enough to permit the court to 'weigh the considerations of economy and expedient judicial administration against the defendant's interest in having a free choice with respect to testifying.'" (*Thomas, supra*, 53 Cal.4th at p. 800.)

Here, Ramirez explained the nature of the testimony he wanted to provide in the A.P. case and his reason for not wanting to testify in the E.Q. matter. But his explanation shows no strong need to refrain from testifying in the E.Q. matter. He could have taken the stand and testified consistently with his prior statements to the police. Ramirez offered no specific facts below or on appeal how cross-examination about the charges involving E.Q. would expose him to clear prejudice. It is speculative to suggest Ramirez would have suffered significant prejudice from a failure to testify concerning the E.Q. charges given his statements during the covert call and to the police.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.